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Supreme Court of the United States

October Term, 1949.

No. 657.

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON and G. FREDERIC HELBIG,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MACON, DUBLIN & SAVANNAH RAILROAD COMPANY.

Petition of Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig for a Rehearing.

DAVID M. PALLEY,
Counsel for Appellants.

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Petition of Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig for a Rehearing.

To the Honorable Fred M. Vinson, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The appellants, Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson and G. Frederic Helbig, respectfully pray for a rehearing of this cause.

Jurisdiction.

The petitioners appealed from a judgment entered in the office of the Clerk of the United States District Court for the Southern District of New York after trial before

a three judge court. On April 3, 1950, this Court granted the motion to affirm the judgment and the judgment was affirmed. This petition is filed within fifteen days thereafter under Rule 33.

Reasons for Petition for Rehearing.

Your petitioners, through inadvertance, did not present a brief in opposition to the motion to affirm and for their inadvertance they respectfully apologize. They respectfully pray that they be permitted at this time to state the reasons why the motion to affirm should have been denied and respectfully ask that this Court reconsider the matter and permit them to present their cause for determination by this Court on the merits.

The appellants challenged the constitutionality of Section 20b of the Interstate Commerce Act, 49 USC 20b, and sued to have annulled and perpetually enjoined an order of the Interstate Commerce Commission dated March 10, 1949, which authorized and approved the extension to January 1, 1972, of bonds of the Macon, Dublin & Savannah Railroad Company, which had become due and payable on January 1, 1947. The District Court dismissed the complaint on the ground that it did not have jurisdiction to consider the cause on the merits because the appellants did not make an application for reconsideration or rehearing of the order of March 10, 1949. The lower court held that the application should also have been made for reconsideration and rehearing of the order of March 10. In its opinion the Court said:

> "And the United States is immune from suit except upon terms laid down by Congress on which it consents to be sued. *United States* v. *Sherwood*, 312 U. S. 584, 586. Since Congress has in explicit terms required a petition for reconsideration to be filed before review in the courts is sought, this court lacks jurisdiction to entertain the present suit."

It was the opinion of the Court that even when the authority of the Commission to make the order is challenged, an application for rehearing or reconstruction is necessary. With respect to that the Court said:

> "The explicit command of Section 17 (9) makes the result inevitable. Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17 (9). The complaint is dismissed for want of jurisdiction."

The District Court did not lack jurisdiction to hear the cause on the merits. First, it was unnecessary to apply for rehearing or reconsideration of either the order of December 9, 1948, or the order of March 10, 1949, because the appellants challenged, on constitutional grounds, the power of the Commission to make either order. Nevertheless, one of the appellants did apply for the reconsideration of the report and order of December 9, and that application was denied by the whole Commission. If the appellants had applied for reconsideration of the March 10th order the Commission would have been powerless to grant the application because upon making that order the Commission became *functus officio.*

Primarily, the appellants seek to recover upon their bonds which became due and were not paid. Ordinarily they would have brought suit upon their bonds and the Court in that action could have determined the constitutionality of section 20b. Since an adjudication that section 20b is unconstitutional would result in annulment of an order of the Interstate Commerce Commission, the

United States must be made a party and such an action must be brought in the United States Courts. 28 USC 2321; 2322; *Seaboard Air Line Railroad Company* v. *Daniel*, 333 U. S. 118; *United States* v. *Idaho*, 298 U. S. 105; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557; *Lambert Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377.

Macon, Dublin & Savannah Railroad Company was made a party defendant because the action is primarily against it upon the bonds; the United States is made a party defendant pursuant to the mandate of Section 2322 of the Judicial Code and Judiciary act.

It is clear from a reading of Section 17 (9) of the Interstate Commerce Act that its purpose is to afford the Commission or an appellate division an opportunity to correct "any decision, order or requirement of a division, an individual Commissioner or a board with respect to any matter assigned or referred to him or it."

This, however, is not an action to set aside, for error an order of the Interstate Commerce Commission but to *annul* an order of the Commission because it lacked the constitutional power to make it.

Section 1336 of the Judicial Code and Judiciary act (28 USC 1336) expressly vests, in the district courts, jurisdiction in actions "to enforce, enjoin, set aside, *annul* or suspend, in whole or in part any order of the Interstate Commerce Commission." (Emphasis supplied.) And sections 2321 and 2322 (28 USC 2321; 2322) contain consent by the United States to such suits. Suits to *annul* in whole or in part any order of the Interstate Commerce Commission must be brought against the United States; it is an indispensable party.

Section 17 (9) of the Interstate Commerce Act requires an application for rehearing, etc., in suits "to enforce, enjoin, suspend, or set aside orders of the Commission." The word "annul" is omitted from Section 17 (9).

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Clearly Congress intended by the word "annul" which is found in Sections 1336, 2321, and 2322 but not in Section 17 (9) to confer jurisdiction upon the District Courts in actions in which the validity of an order is challenged not for errors or irregularity committed by a board, division or a Commissioner, but for lack of jurisdiction in the Commission to make the order. And an application for rehearng, etc., in such a case is not necessary and is not required by Section 17 (9).

In the instant case the appellants did not anticipate the decision of the Cimmission. Suit was brought after the conclusion of the proceedings before the Commission and after the modification plan had been declared binding upon all bondholders. cf. *Aircraft & D. Equipment Corp.* v. *Hirsch*, 331 U. S. 752.

An application to the Commission for reconsideration of the order of March 10, would have been futile because the Commission could not grant the relief requested, namely, a declaration that Section 20b is unconstitutional and the order therefor void.

In fact, the appellants could not conscientiously make application for reconsideration of the order of March 10th, or of any order of the Commission, because their objection to the order is on constitutional grounds. Rule 101 (d) of the Rules of General Practice of the Commission requires an application for reconsideration to state "the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity." The appellants could not make application for reconsideration and comply with the rules laid down by the Commission for such application.

To deny the appellants recourse to the Courts will leave them remediless. They cannot recover upon their bonds until the bar of the order of March 10, 1949, is removed and they are denied the right to sue for the annulment of that order because they did not make application

for its reconsideration on a ground that the Commission could not consider.

Nevertheless, one of the appellants, Helbig, did make application for the reconsideration of the only order which the Commission, under the provisions of section 20b, could reconsider. In its report of December 9, 1948, the Commission, after hearing, made the findings required by section 20b and in its order of the same date authorized the submission of the modification plan to the bondholders for acceptance or rejection. Within the thirty days allowed therefor, Helbig made application for reconsideration of that report and order. And he also asked for a rehearing with leave to submit evidence bearing on the matter and based on information acquired by him after the report was made. That application was denied in its entirety by the whole Commission. Thereafter the modification plan was submitted to the bondholders and accepted by more than the necessary percentage. Section 20b expressly provides that when the necessary percentage have accepted the modification plan "the Commission shall enter an order approving and authorizing the proposed alteration or modification." Apparently that requirement is mandatory upon the Commission and the Commission must in that event make the necessary order. But whether or not the making of that order is mandatory there can be no doubt that having made it, the Commission may no longer reconsider it or set it aside, except possibly for error or fraud in counting or procuring consents. *In re Minneapolis St. P. & SS. M. Ry. Co.*, 50 F. Sup. 748.

Importance of the Questions Involved.

This case presents two questions which are important and which have never been passed upon by this Court.

The first and which the appellants have thus far considered, is the right to sue to annul an order of the Interstate Commerce Commission on the ground that the

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Commission lacked statutory or constitutional power to make it, without an application for reconsideration, etc., under Section 17 (9) of the Interstate Commerce Act. The last case in which this question was considered by this Court is *United States* v. *Idaho*, 298 U. S. 105. And that case was decided before the enactment of Section 17 (9).

The other question is the constitutionality of Section 20b of the Interstate Commerce Act (49 USC 20b. Pub. Laws No. 478, Apr. 9, 1948). That question has never been passed upon by this Court.

It is the thesis of the Government that Congress, in the public interest, under the power granted to it by the Commerce clause of the Constitution may authorize railroad companies to postpone the payment of debts which will become due, and that the giving to a creditor of a promise to pay in the future is the equivalent of payment at maturity. It is their contention that Congress in the exercise of its power may remove and eliminate all evils and burdens and obstructions affecting interstate commerce and that if a railroad company finds a debt which is about to become due or is past due burdensome, then the railroad may say to the creditor "you take my promise of payment in the future in place of the cash which you should receive now".

The constitutional power "to regulate commerce with foreign nations and among the several states" does not vest in Congress the right to postpone the payment of debts which have matured, especially those which had matured before the act authorizing such postponement was enacted. Nor may Congress compel creditors who were entitled to immediate payment to accept a promise of payment in the future.

That power—the power to postpone the maturity date of debts—can be exercised only through the power "to establish uniform laws on the subject of bankruptcies", subject, however, to the rule of "due process". *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

It is a fundamental principle of our jurisprudence that the property of the debtor should be applied to the payment of his debts. To that end, our courts—law and equity—are invested with power to seize and sell the property of an unwilling debtor and to distribute the proceeds to his creditors. The creditors may not demand payment before the debt is due; the debtor may not insist that the creditor extend the due date, either before or after the debt has matured.

This principle of the application of the debtor's property to the satisfaction of his debts is an inherent essential of our bankruptcy law. In the ordinary bankruptcy, the court seizes the assets, sells them and distributes the proceeds among the creditors in order of priority. *Ashton* v. *Cameron County W. I. Dist. No. One,* 298 U. S. 513, 537; *Kushner* v. *Irving Trust Co.,* 299 U. S. 445; 452.

Reorganization, whether under Chapter X or Section 77, is an extension of that principle. It is in effect a liquidation with a theoretical distribution in kind which the recipients pool for the continuance of the enterprise.

Because of the complexity of our economic system and the inability to dispose of gigantic enterprises at fair prices, the industry is continued for the benefit of the participants. The industry has a value only as a going concern and it is only through the continuance of the industry as a going concern that its value may be realized and its creditors paid. There is in fact payment, but the payment is in the only form and manner which is practicable in the circumstances. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106; *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448.

The rule of absolute priority prevails and those in junior positions may not participate until the demands of their seniors have been fully satisfied. The powers of bankruptcy may not be perverted to the benefit of the debtor at the expense of the creditor, nor may it be abused to enable one class to benefit at the expense of another.

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Consolidatd Rock Products Co. v. *Du Bois,* 312 U. S. 510.

Section 20b is distinctly a reorganization statute. *Schwabacher* v. *United States,* 334 U. S. 182. Its primary purpose is to by-pass the Bankruptcy Act. It was specifically designed to enable railroads to avoid the consequences of the bargain which they had made with their creditors. Senate Report 897, 2 U. S. Code Congressional Service 1948, 1450.

Section 20b is not a statute regulating commerce. It is, in fact, an abortive bankruptcy statute enacted under the power granted to Congress to regulate commerce. It was deliberately fashioned to circumvent the principle of the application of the debtor's property to the satisfaction of his debts. It takes rights from the creditor for the benefit of the debtor.

The denial to the creditors of railroad corporations of the right to collect debts which become due, and especially as in the instant case, debts which matured before the law was enacted, amounts in effect to a destruction of the contract and constitutes a taking of property without due process of law in violation of the Fifth Amendment. *Lynch* v. *United States,* 292 U. S. 571; *Holden* v. *Hardy,* 169 U. S. 366; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The power to regulate interstate commerce is as much subject to the rule of "due process" as is the bankruptcy power. *North American Co.* v. *Securities & Exch. Com.,* 327 U. S. 686, 704.

Section 20b also violates the Tenth Amendment. Strictly speaking it is not a statute regulating interstate commerce. Rather, its aim is to regulate the relationship existing between railroad corporations and their creditors, but it does not rise to the standard required of a bankruptcy statute. It was expressly enacted to enable railroad corporations to evade and avoid strict performance of their contract obligations and especially to postpone the date of maturity of obligations for the payment of money.

Except to the extent permitted by the bankruptcy clause of the Constitution, Congress may not, directly, legislate on the subject of the relationship of debtor and creditor; that is not a power delegated to the federal government. *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 648; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Schecter Poultry Co.* v. *United States*, 295 U. S. 495.

The federal government may and has affected the rights of creditors and modified private creditors' contracts through legislation enacted within the scope of the powers delegated to it by the Constitution. All contracts, expressly or impliedly, are made subject to the proper exercise by Congress of its powers. *Continental Co.* v. *United States*, 259 U. S. 156.

Under the power to coin money and regulate the value thereof, Congress may require the creditor to accept payment, not in gold of a certain standard and fineness as provided in the contract, but in legal tender. *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240.

Under the interstate commerce clause it may pass the Public Utility Holding Company Act (15 U. S. C., Sec. 79) and in the break-up of a system, compel stockholders to accept the economic equivalent of their stock (*Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624); it may prepay bonds without a premium (*Mass. Mutual Life Ins. Co.* v. *Securities and Exchange Commission*, 151 F. [2d] 424); and it may compel creditors to accept payment partly in cash and partly in stock, or entirely in stock, provided the cash and stock or the stock alone are of sufficient value to fully discharge the obligation. *In Re Standard Gas & Electric Co.*, 151 F. (2d) 326; *In Re Community Gas & Power Co.*, 71 F. Sup. 171, aff'd 168 F. (2d) 740, cert. denied 334 U. S. 846.

A critical study of the cases in which creditors' rights were altered or modified will disclose that in no instance was the debt reduced, the rate of interest modified, or the maturity date extended, except in reorganizations under the

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Bankruptcy Act. And under the Bankruptcy Act there was always enforced the principle of the application of the debtor's assets to its debts.

It must be remembered that in the instant case the complaint is from creditors whose obligations have matured; who are entitled to payment and who have been denied payment and have also been denied the right to apply the debtor's assets to the payment and discharge of their obligations.

If this power to extend the maturity of debts of railroad corporations may be vested in the Interstate Commerce Commission then a similar power might be granted by Congress to the Securities & Exchange Commission over the debts of others engaged in interstate commerce.

In Conclusion.

For the reasons set forth, the appellants respectfully urge that a rehearing be granted; that upon further consideration the judgment of affirmance be vacated and that this cause be placed upon the calendar of this Court for argument.

Respectfully submitted,

JACOB F. HOLMES
JAMES D. BELL,
JEANNETTE P. BEL.
CHARLES E. PORTEOUS
MARGARET F. SCHMUCKER
AMELIA A. MEURY
JANE S. MATHEWSON
G. FREDRIC HELBIG
By DAVID M. PALLEY,
Counsel for Appellants.

I, David M. Palley, counsel for the above named appellants, Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, Amelia A. Meury, Jane S. Mathewson, G. Frederic Helbig, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DAVID M. PALLEY,
Counsel for Appellants.